1993

The State of Utah v. Ronald L. Boren : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
RONALD L. BOREN,	:	Case No. 930275-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Ronald O. Hyde, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. section 78-2a-3(2)(f) (1992), and Utah R. Crim. P. 26(2)(a), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are contained in the text of this brief or in Addendum A:

Utah Code Ann. § 41-1-109
Utah Code Ann. § 41-1a-1311
Utah Code Ann. § 41-1a-1314
Utah Code Ann. § 76-6-401
Utah Code Ann. § 76-6-404
Utah Code Ann. § 76-6-412

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether the trial court failed to properly define the charge of "theft" and whether the inadequately defined instruction precluded the jury from considering lesser offenses, charges pertinent to Mr. Boren's theory of the case. "Because an appeal challenging the refusal to give jury instructions presents questions of law only, we grant no particular deference to the trial court's rulings." Carpet Barn v. State, 786 P.2d 770, 775 (Utah App. 1990); State v. James, 819 P.2d 781, 798 (Utah 1991).

2. Whether the jury instructions created an impermissible mandatory rebuttable presumption? See standard of review for issue one; accord State v. Vigil, 842 P.2d 843, 844 (Utah 1992) (on "matter[s] of statutory interpretation[,] . . . we review the trial court's ruling for correctness and give no deference to its conclusions"); Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989) ("A trial court's legal conclusions are accorded no particular deference").

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Ronald O. Hyde, presiding. Following a two day trial, a jury convicted Mr. Boren of the above charge on February 10, 1993. (R 212). Shortly thereafter, Mr. Boren moved for a new trial and a certificate of probable cause. (R 219-54). His motions

were denied.

On April 16, 1993, following entry of judgment for the next lower category of offense, the trial court sentenced Mr. Boren to an indeterminate term of zero-to-five years in the Utah State Prison together with an order to pay $150.00 in restitution. (R 262-65). The court then stayed the prison sentence and placed him on probation for 36 months. (R 265-66).

Other statements pertinent to the proceedings, including motions made before, during, and after the trial, are more fully discussed below. The relevant motions are attached in Addendum B and incorporated herein.

STATEMENT OF THE FACTS

The facts are contained in the body of the brief, intertwined in the legal analysis regarding the jury instructions. In brief, Lyla Shore, a friend of Jeb Clark, had borrowed Mr. Clark's car on April 18, 1992. (R 443, p.105). Sometime that day after 3:00 or 4:00 p.m., Lyla noticed the car was missing. (R 443, p. 106). The next morning, at approximately 8:30 a.m., Jeb, Lyla, and her son Bryan located the car at the residence of Mr. Boren's ex-wife. (R 443, p.106-08).

Ron Boren was owed money for repairing and fixing the car. (R 366-67); (R 443, pp.92, 94). When Jeb, Lyla, and Bryan confronted Ron, they told him to hand over the ignition switch, a device used to start the car. (R 443, p.113). Ron complied. He threw the device and ran away. (R 443, p.113). Bryan caught him,

punched him, and the incident ended. (R 443, p.110).

SUMMARY OF THE ARGUMENT

The trial court erred when it refused to properly define the charge of theft. As the courts below already had recognized, the case ultimately hinged on the element of intent. The "purpose to deprive" instruction, however, was inadequately defined. The distinction between "temporary" deprivation and "permanent" deprivation never was made clear to the jury. Due to the flawed wording of the instructions, the jury lacked the ability to distinguish and choose between the lesser included offenses and the temporary nature of the alleged deprivation.

The defective instructions also contained an impermissible mandatory presumption against Mr. Boren on the critical intent determination. The involved jury instruction mirrored the corresponding statute. While such authority was an appropriate point of legal reference for the trial court to use in deciding whether the case should be submitted to the jury, the same authority should not have been used by the jury in its fact finding determinations. The wording of the statute improperly allowed the burden of proof to shift to Mr. Boren. The trial court erred in not correcting the defects in a manner consistent with Mr. Boren's requests.

ARGUMENT

POINT I

THE TRIAL COURT'S REFUSAL TO CORRECT THE INSTRUCTIONS PREVENTED THE JURY FROM FINDING A "TEMPORARY" (AS OPPOSED TO "PERMANENT") INTENT TO DEPRIVE

The case at bar presents a slight variation of the issue presented in State v. Chesnut, 621 P.2d 1228 (Utah 1980). The issue here is whether the trial court's failure to properly define the charge of "theft" precluded the jury from considering lesser offenses, charges pertinent to Mr. Boren's theory of the case.

The theft definition includes a purpose to "permanently" deprive another of his or her property. See Utah Code Ann. § 76-6-401(3)(a). The court below, however, refused to insert the adverb, "permanently", before the word, "deprive", in the designated theft instructions. (R 383-84) (copies of jury instructions #9, #10, & 11 are attached in Addendum C). Such an insertion was critical to distinguishing theft from the lesser offenses.

Like Mr. Boren, the defendant in Chesnut was tried and convicted "of theft of an operable motor vehicle in violation of Section 76-6-404 and 76-6-412(a)(ii)." Compare (R 212), with Chesnut, 621 P.2d at 1231. "Under [defendant Chesnut and Mr. Boren's] theory of the facts as set forth in the evidence there was a rational basis to acquit him of the crime of theft and convict him of the lesser included offense of joyriding[.]" See Chesnut, 621 P.2d at 1232 (the "joyriding" statute referred to in Chesnut is now encompassed by Utah Code Ann. §§ 41-1a-1311(1); 41-1a-1314(1)); cf. (R 225) (in Mr. Boren's case, Utah Code Ann. § 41-1a-1311(1)

[unauthorized control over a motor vehicle, a class A misdemeanor] and Utah Code Ann. § 41-1a-1314(1) [unauthorized control over a motor vehicle, a third degree felony] had potential application).

Disputed in the Chesnut case was whether the defendant intended to permanently deprive the owner of his property, a motorcycle. While the jury had apparently found such an intent, on appeal the supreme court reversed because the defendant's theory of temporary deprivation was omitted from the jury instructions. Chesnut, 621 P.2d at 1231-32. "[T]he issue of defendant's intent should [have been] submitted to the trier of fact with the requested instruction on the lesser included offense of joyriding." Id. at 1232.

> Such an instruction [on lesser included offenses] may properly be refused if the prosecution has met its burden of proof on the greater offense, and there is no evidence tending to reduce the greater offense. If there be any evidence, however slight, on any reasonable theory of the case under which defendant might be convicted of a lesser included offense, the trial court must, if requested, give an appropriate instruction.

Chesnut, 621 P.2d at 1232 (original emphasis added by the court).

At trial, defendant Chesnut "testified his intention was to return the motorcycle after he had ridden for an hour or so." Id. at 1230. The jury, however, never received the opportunity to consider Chesnut's theory of temporary deprivation and the lesser included offense of joyriding. The supreme court remanded the case for a new trial. Id.

Similarly, in the case at bar the issue of intent was inadequately considered by the jury. The trial court's refusal to "insert the word 'permanently' before the word deprive" was vital to the "temporary" deprivation issue, (R 383-84), especially because of the marginal nature of the evidence. (R 345-46).

Jeb Clark's car was missing for no more than 18 hours. See (R 443, p.134); (R 443, p.106-08) (prosecution witness Lyla Shore indicated that the car was missing sometime after 3:00 or 4:00 p.m. on April 18, 1992, and located the next day around 8:30 a.m.); cf. Utah Code Ann. §§ 41-1a-1311(1); 41-1a-1314(1) (unauthorized control of a vehicle for less than 24 hours may be a class A misdemeanor or a third degree felony).

When Jeb Clark (Lyla Shore, and her son, Bryan), confronted Ron Boren, they told Ron to hand over the ignition switch, a device used to start the car. (R 443, p.113). Boren immediately complied. He threw the device over a fence and ran away. (R 443, p.113). Even though Mr. Boren did not politely hand over the ignition switch to Jeb Clark, the trial court recognized that Ron had returned control of the car back to the owner. (R 443, p.113-14).

The temporary nature of the deprivation and the applicability of lesser offenses already had been acknowledged by the court during preliminary discussions over the jury instructions:

> [The State]: [Mr. Boren's counsel] has [proposed a] Class A [jury instruction], and I've done the third degree [instruction] assuming that you [the court] are going to give that, and . . . the way I read it is the Defendant would have to have brought that car back

> within 24 hours to qualify for Class A, and he didn't do that.
>
> [Counsel for Mr. Boren]: That's not what the law says. . . . [W]hat the law says is it's a third degree. If you fail to do that, it's a Class A, if you exercise unauthorized control with intent to temporarily deprive. That's the statutory limit.
>
> [The State]: What I'm reading, third degree to exercise, if the person does not return the motor vehicle to the owner, lawful custodian, within 24 hours and he didn't do --
>
> THE COURT: Well, I think he did. He [Mr. Boren] gave them the key back, the ignition, when they told him to.
>
> [The State]: Well, at any rate, that's what I'm weighing it to.
>
> THE COURT: Those are arguable facts for you. That's the jury's. All right.

(R 443, p.133-34); (R 388). Since Ron Boren "gave them the key back, the ignition, when they told him to[,]" (R 443, p.134), "there was a rational basis to acquit him of the crime of theft and convict him of the lesser included offense . . ." Chesnut, 621 P.2d at 1232.

The evidence presented at the preliminary hearing was no better and even then the question of intent had been the key issue:

> THE COURT: Okay. I'm prepared to make a ruling and I'll tell you that I think that this case definitely does hinge on the intent to deprive issues. I'm going to preface my finding with the fact that the level of proof at a preliminary hearing, as you know, is very low. Probable cause is a low threshold and I believe the State has met that threshold of probable cause. . . .
>
> I will tell you, also, as an aside, I think the evidence is pretty thin. I think it meets the

> threshold of probable cause but, [Counsel for Mr. Boren], I think the points you've raised are valid. And I'm frankly telling you I think it's a close call, the call I've made. And I'm basing it on what I consider to be a low threshold.

(R 345-46).

Despite the questionable nature of the State's evidence on the "purpose to deprive" element, the trial court refused to "insert the word 'permanently' before the word deprive." (R 383). The court reasoned, "the definition of purpose to deprive is given in instruction ten, and it uses the word permanently, etc., so I will not change that." (R 384).[1]

However, the "purpose to deprive" definition lists three independent meanings. (R 194). "Permanently" modifies only one of the three alternative definitions. (R 194); (R 194; 432-34) (in response to the jury's request for clarification, the trial court explained that "purpose to deprive" contains three independent alternative meanings and it also penciled in "a", "b", and "c" and underscored "or" to emphasize their separate nature). Hence, the

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1. "Purpose to deprive" is defined in Instruction #10. The instruction, prior to the court's alterations, read:

> "Purpose to deprive" means to have the conscious objective to withhold property permanently or for so extended a period or to use under circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost, or to restore the property only upon payment of a reward or other compensation, or to dispose of the property under circumstances that make it unlikely that the owner will recover it.

(R 194).

jury was allowed to consider either one of the two other alternatives, both of which were not modified by the adverb, "permanently."[2] See infra Point II (one alternative definition for "purpose to deprive" was independently flawed).

The trial court's denial of Mr. Boren's requested modifications was, in substance, the same type of denial by the trial court in Chesnut. While lesser offenses were included in the instant action, unlike their complete omission in Chesnut, in both cases "permanent" versus "temporary" deprivation was the critical issue not considered by the jury. The plain language of the instructions here prevented the jury from considering the lesser

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2. A single flawed alternative theory in a criminal trial invalidates the entire verdict:

> In a civil case, we will affirm a general verdict so long as there is one legally valid theory among those upon which the case went to the jury and sufficient evidence to support a verdict on that theory. However, in a criminal case the rule is to the contrary. . . . [A] general verdict of guilty cannot stand if the State's case was premised on the elements of the crime and any one of those theories is flawed or lacks the requisite evidentiary foundation. In such circumstances, it is impossible to determine whether the jury agreed unanimously on all of the elements of a valid and evidentially supported theory of the elements of the crime.

State v. Johnson, 821 P.2d 1150, 1159 (Utah 1991) (emphasis added and citations omitted); cf. State v. Haston, 846 P.2d 1276 (Utah 1993) (per curiam) ("Since the jury was allowed to consider the depraved indifference alternative, as well as those states of mind described in subsections (a) and (b) . . . defendant is entitled to a new trial"); Sandstrom v. Montana, 442 U.S. 510, 526 (1979) ("it has long been settled that when a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction [or verdict] be set aside").

offenses in the same manner as if they had never been given. See (R 195-97) (lesser charges could not be considered until after the initial determination of the theft charge); Parker v. Randolph, 442 U.S. 62, 73 (1979) (Rehnquist, J.) ("A critical assumption underlying that system [of trial by jury] is that juries will follow the instructions given them by the trial judge") quoted in Francis v. Franklin, 471 U.S. 307, 324-35 n.9 (1985) (Brennan, J.); accord (R 229, 230, 232) (juror affidavit explaining that the jury obediently followed the instructions: "I and others felt that because of the instructions, a lesser charge could not be considered unless the accused was 'not guilty of the greater offense") (attached in Addendum D).

In fact, in Chesnut, in addition to having arguably enough evidence to support the second degree felony theft charge, see 621 P.2d at 1231, the jury also considered only the permanent deprivation alternative. Id. at 1231 n.1. Thus, unlike the present situation where the applicability of "permanent" deprivation never was made clear, (R 194), the Chesnut jury specifically focused on whether the defendant had a purpose to permanently deprive. 621 P.2d at 1231 n.1. Despite the jury's finding of the requisite intent, the supreme court held that the trial court should not have rejected defendant Chesnut's theory of temporary deprivation. Id. at 1232.

The Chesnut principles apply to Mr. Boren's situation with even greater force because of the unclear instructions and the availability of three independent alternative "purpose to deprive"

definitions. (R 194; 432-34).[3] Since the adverb, "permanently", was not inserted before the word deprive, the jury was allowed to find a permanent deprivation or a temporary deprivation. In other words, theft could have been established under either type of intent and the jury was left with no reason to consider the lesser charges.[4] The trial court's ruling was in error.

POINT II

THE JURY INSTRUCTIONS CONTAINED AN UNCONSTITUTIONAL MANDATORY PRESUMPTION

"The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Francis v. Franklin, 471 U.S. 307, 313 (1985) (quoting In re Winship, 397 U.S. 358 (1970)). "This 'bedrock, "axiomatic and elementary" [constitutional] principle'

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3. Cf. State v. Ash, 23 Utah 2d 14, 456 P.2d 154 (1969) (unlike the failure in the case at bar to specifically instruct the jury on permanent deprivation, "defendant [Ash] could not have been prejudiced by a failure to have the jury consider whether his intent was to deprive the owner of the use of his car temporarily because the court clearly told the jury to find the defendant not guilty if they failed to find beyond a reasonable doubt that he intended to deprive the owner permanently of the use of the car") (emphasis added by the court).

4. The lower court's denial of Mr. Boren's requests created an "all or nothing" theft instruction in a manner already condemned in the analogous context of a court refusing to give a lesser included offense. See State v. Hansen, 734 P.2d 421, 428 (Utah 1986) ("This is exactly the sort of forced choice that lesser included offense instructions are designed to avoid, and exactly the choice that the jury would not have had to make if [the lesser included offense] instruction had been give").

prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." Franklin, 471 U.S. at 313 (citations omitted).

The issue here is whether the jury instructions relieved the State of its burden of proof on the critical element of intent. Jury instruction #10 contains the contested language. It stated in pertinent part:

> "Purpose to deprive" means to have the conscious objective to withhold property permanently or for so extended a period or to use under circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost, or to restore the property only upon payment of a reward or other compensation, or to dispose of the property under circumstances that make it unlikely that the owner will recover it.

(R 194) (emphasis added).

"The analysis is straightforward. 'The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes.'" Francis v. Franklin, 471 U.S. 307, 313-14 (1985) (quoting Sandstrom v. Montana, 442 U.S. 510, 514 (1979)).

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State have proven the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed

element unless the defendant persuades the jury that such a finding is unwarranted.

Franklin, 471 U.S. at 314 & n.2.[5]

Jury instruction #10 created a mandatory presumption. Instead of requiring the State to prove a "purpose to deprive", the instruction only required the State to prove a predicate fact. While a jury may infer a "purpose to deprive" upon proof that "the property [would be restored] only upon payment of a reward or other compensation . . . ," a jury also should be able to reject such an inference. Instruction #10, however, precluded such a rejection because it simply equated a "purpose to deprive" with the corresponding predicate fact. The predicate fact was essentially prima facie evidence of the "purpose to deprive" element. Once the State established the predicate fact, the burden shifted to Mr. Boren to show that he did not possess the criminal intent.

State v. Johnson, 745 P.2d 452 (Utah 1987), lends analogous guidance in this regard. The opinion carefully distinguished between an unconstitutional presumption and a permissible inference. The following language contains an improper presumption: "Possession

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5. Two sentences in Franklin focused on the element of intent. "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." Francis v. Franklin, 471 U.S. 307, 315 (1985). Notwithstanding the Georgia Supreme Court's interpretation of "this language as creating no more than a permissive inference. . . ," the United States Supreme Court reversed because of "what a reasonable juror could have understood the charge as meaning." Id. at 315-16.

of property recently stolen when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property." See id. at 456 (citing Utah Code Ann. § 76-6-402(1)). A slight modification, however, corrects the presumption: "Under the law of the State of Utah, possession of property recently stolen, when a person in possession fails to make a satisfactory explanation of such possession, is a fact from which you may infer that the person in possession stole such property." 745 P.2d at 456.

Unlike the modified Johnson instruction which enabled the jury to infer, instruction #10 left the jury with no choice other than to presume a "purpose to deprive" upon proof of the predicate fact. Using the predicate fact to infer criminal intent is proper; however, the jury should not have been instructed that the predicate fact "means" intent. (R 194). The lower court failed to distinguish between authority which may be considered by the court and instructions which must not be given to the jury. Compare State v. Chambers, 709 P.2d 321, 326-27 (Utah 1985) ("the statute provides a standard [for the court] by which to determine the sufficiency of the evidence for submitting the case to the jury"), with id. at 327 (for situations like the case at bar, "the statutory language should not be used in any form in instructing juries in criminal cases").

Jury Instructions #9 & #11 also contained and incorporated the unconstitutional intent definition. (R 193, 195). The jury instructions were impermissibly defective.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand this case for a new trial.

SUBMITTED this 8th day of October, 1993.

RONALD S. FUJINO
Attorney for Defendant/Appellant

ROGER K. SCOWCROFT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 8th day of October, 1993.

RONALD S. FUJINO

DELIVERED by _____

this _____ day of October, 1993.

_____

ADDENDUM A

41-1-109. Unlawful control over vehicles — Penalties — Effect of prior consent — Accessory or accomplice.

(1) Any person who exercises unauthorized control over a vehicle, not his own, without the consent of the owner or lawful custodian and with intent to temporarily deprive the owner or lawful custodian of possession of the vehicle, is guilty of a class A misdemeanor.

(2) An offense under this section is a third degree felony if the actor does not return the vehicle to the owner or lawful custodian within 24 hours after the exercise of unauthorized control.

(3) The consent of the owner or legal custodian of a vehicle to its control by the actor is not in any case presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the vehicle by the same or a different person.

(4) Any person who assists in, or is a party or accessory to or an accomplice in, an unauthorized taking or driving is guilty of a class A misdemeanor.

41-1a-1311. Unlawful control over motor vehicles, trailers, or semitrailers — Penalties — Effect of prior consent — Accessory or accomplice.

(1) It is a class A misdemeanor for a person to exercise unauthorized control over a motor vehicle, trailer, or semitrailer not his own, without the consent of the owner or lawful custodian and with intent to temporarily deprive the owner or lawful custodian of possession of the motor vehicle, trailer, or semitrailer.

(2) The consent of the owner or legal custodian of a motor vehicle, trailer, or semitrailer to its control by the actor is not in any case presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the motor vehicle, trailer, or semitrailer by the same or a different person.

(3) Any person who assists in, or is a party or accessory to or an accomplice in, an unauthorized taking or driving is guilty of a class A misdemeanor.

41-1a-1314. Third degree felony to exercise unauthorized control for extended time.

(1) It is a third degree felony to exercise unauthorized control over a motor vehicle, trailer, or semitrailer if the person does not return the motor vehicle trailer, or semitrailer to the owner or lawful custodian within 24 hours after the exercise of unauthorized control.

(2) The consent of the owner or legal custodian of a motor vehicle, trailer, or semitrailer to its control by the actor is not in any case presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the motor vehicle, trailer, or semitrailer by the same or a different person.

76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

76-6-412. Theft — Classification of offenses — Action for treble damages against receiver of stolen property.

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

(i) value of the property or services exceeds $1,000;

(ii) property stolen is a firearm or an operable motor vehicle;

(iii) actor is armed with a deadly weapon at the time of the theft

or

(iv) property is stolen from the person of another;

ADDENDUM B

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MOTION FOR NEW TRIAL
Plaintiff,	:	
v.	:	
RONALD L. BOREN,	:	Case No. 921901604FS JUDGE TIMOTHY R. HANSON
Defendant.	:	

The defendant, RONALD L. BOREN, respectfully moves this Court to grant him a new trial in the above-numbered case pursuant to the provisions of Rule 24, Utah Rules of Criminal Procedure (1992).

This Motion is made on the grounds that the jury was substantially misled by the jury instructions. See attached Questionnaire response of juror Garth N. Peterson. The jury instructions misled the jury by defining the offense of Automobile Theft, a second-degree felony under §§76-6-401, 76-6-404 and 76-6-412, Utah Code Ann. (1990), in a manner that is indistinguishable from the lesser offense of Unauthorized Control Over a Motor Vehicle, a third-degree felony under §41-1a-1314, Utah Code Ann. (Supp. 1992), and a class A misdemeanor under §41-1a-1311,

Utah Code Ann. (Supp. 1992) (see attached jury instructions 9, 10, 11, 12, 13 and 14).

Further, instructing the jury on the provisions of §76-6-401(3)(b), Utah Code Ann. (1990) (definition of "purpose to deprive), created a mandatory presumption of criminal intent on the basis of mere conduct. Defendant objected to so instructing the jury prior to trial on the same grounds. See attached Motion in Limine Not to Instruct the Jury on §76-6-401(3)(b).

DATED this 14 day of ~~April~~ March, 1993.

ROGER K. SCOWCROFT
Attorney at Law

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 14 day of ~~April~~ March, 1993.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

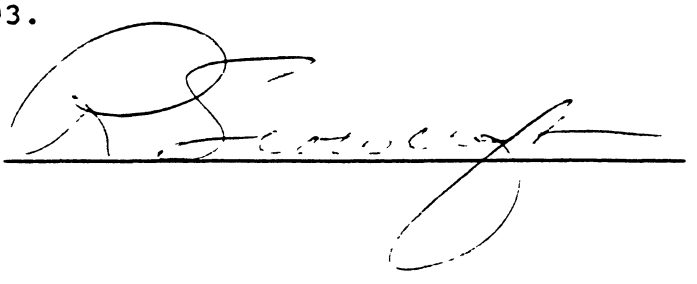
STATE OF UTAH,	:	ORDER FOR NEW TRIAL
Plaintiff,	:	
v.	:	
RONALD L. BOREN,	:	Case No. 921901604FS JUDGE TIMOTHY R. HANSON
Defendant.	:	

Based on Motion of defendant and for good cause shown, it is hereby ordered that the conviction previously entered in the above-numbered case be vacated and that a new trial be held in the above-numbered case.

IT IS SO ORDERED this _____ day of April, 1993.

HONORABLE TIMOTHY R. HANSON
Third District Court

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 17 day of ~~April~~ March, 1993.



Prosecutorial misconduct.

Prosecutorial misconduct before trial was grounds for a new trial, not an arrest of judgment, even though defendant's motion for arrest of judgment or in the alternative for a new trial was made before imposition of sentence. State v. Owens, 753 P.2d 976 (Utah Ct. App. 1988).

Variance between charge and verdict.

Although the verdict form signed by the jury foreman stated that the defendant was guilty of "forcible sexual assault" and the information had charged the defendant with "aggravated sexual assault," the variance did not justify the granting of a motion to arrest judgment on the basis of uncertainty as to what the jury intended; an error on the jury verdict form does not create uncertainty per se, and there was no reason to doubt that the jury intended to find the defendant guilty as charged. State v. Gentry, 747 P.2d 1032 (Utah 1987).

Cited in State v. Eldredge, 773 P.2d 29 (Utah 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 520 to 524.

C.J.S. — 23A C.J.S. Criminal Law § 1453 et seq.

A.L.R. — Coram nobis on ground of other's confession to crime, 46 A.L.R.4th 468.

Key Numbers. — Criminal Law ⇔ 974 to 976.

Rule 24. Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

NOTES TO DECISIONS

ANALYSIS

Absence of witness.

Where the evidence was discovered before trial but the witness was absent, not only must diligence have been shown in attempting to obtain the testimony of such witness, but an application must have been made to obtain a postponement of the trial so as to give opportunity to obtain such witness or evidence before defendant might avail himself of a motion for a new trial on the ground of newly discovered evidence. State v. Weaver, 78 Utah 555, 6 P.2d 167 (1931).

Defendant was not entitled to a new trial to produce a witness who was unavailable at trial where witness' absence was not due to any error or impropriety at trial, but was due to attendance at an out-of-town convention, and defendant did not ask for a new trial date or a continuance to accommodate the witness' calendar. State v. Gehring, 694 P.2d 599 (Utah 1984).

Affidavits of jurors.

Verdict of guilty of larceny of sheep which

INSTRUCTION NO. 9

Under the law of the State of Utah, a person is guilty of theft if that person obtains or exercises unauthorized control over the property of another with a purpose to deprive the owner thereof.

INSTRUCTION NO. 16

"Property" means anything of value, including tangible personal property.

"Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtained or another.

"Purpose to deprive" means to have the conscious objective to withhold property permanently or for so extended a period or to use under circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost, or to restore the property only upon payment of a reward or other compensation, or to dispose of the property under circumstances that make it unlikely that the owner will recover it.

An "operable motor vehicle" is a motor vehicle capable of being driven.

"On or about" includes any day that closely approximates or is near the day alleged in the Information.

INSTRUCTION NO. 11

Before you can convict the defendant, Ronald L. Boren, of the crime of Theft as charged in count I of the information, you must believe from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 18th day of April, 1992, in Salt Lake County, State of Utah, the defendant, Ronald L. Boren, obtained or exercised unauthorized control over the property of another;

2. That the defendant did so with the purpose to deprive the owner thereof; and

3. That the property was an operable motor vehicle.

If after careful consideration of all of the evidence in this case you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of the offense of Theft as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must consider the guilt or innocence of the defendant with respect to the offense of Unlawful Taking Of A Vehicle, a lesser included offense of count I.

INSTRUCTION NO. 12

The law permits a jury to find an accused guilty of any lesser offense which is necessarily included in the crime charged in the information whenever such a course in consistent with the facts found by the jury from the evidence in the case and with the law as stated by the Court.

If the jury should find the accused "not guilty" of the greater offense as charged in the information and defined in these instructions, then the jury should proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the offense charged.

INSTRUCTION NO. 13

Before you can convict the defendant, Ronald L. Boren, of the offense of Unlawful Taking Of A Vehicle, a Third Degree Felony, a lesser included offense in count I of the information, you must have found that the evidence fails to establish one or more of the elements of Theft beyond a reasonable doubt, and you must find from the evidence, beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That on or about the 18th day of April, 1992, in Salt Lake County, State of Utah, the defendant, Ronald L. Boren, intentionally or knowingly exercised control over a vehicle;

2. That the defendant exercised such control with the purpose to temporarily deprive the owner or lawful custodian of the possession so such vehicle;

3. That the vehicle was not the defendant's own;

4. That the owner or lawful custodian did not consent to nor authorize the defendant to exercise such control over the vehicle; and

5. That the defendant did not return the vehicle to the owner or lawful custodian within 24 hours after the exercise of such unauthorized control.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of the offense of Unlawful Taking Of A Vehicle, a lesser included offense in count I of the information. If, on the other hand, you are not convinced beyond

a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

INSTRUCTION NO. 14

The offense of Unlawful Control over a Motor Vehicle is a lesser included offense within the charged offense of Theft of a Motor Vehicle.

Before you may convict the defendant of the crime of Unlawful Control Over A Motor Vehicle the prosecution must prove each and every one of the following elements to your satisfaction and beyond a reasonable doubt:

1. That on April 18, 1992;

2. In Salt Lake County;

3. Ronald L. Boren;

4. Exercised unauthorized control over a motor vehicle of Jeb Clark;

5. Without the consent of Jeb Clark;

6. With intent to temporarily deprive the owner of it.

If the prosecution has failed to prove any one of these elements beyond a reasonable doubt, then you must find Ronald L. Boren not guilty.

Copy

ROGER K. SCOWCROFT (5141)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION IN LIMINE NOT TO INSTRUCT THE JURY ON
Plaintiff,	:	§76-6-401(3)(b)
v.	:	
RONALD L. BOREN,	:	Case No. 921901604FS JUDGE TIMOTHY R. HANSON
Defendant.	:	

MOTION

The defendant, RONALD L. BOREN, respectfully moves this Court not to instruct the jury according to the provisions of §76-6-401(3)(b), Utah Code Ann. (1990). This Motion is made on the grounds that so instructing the jury violates constitutional rights of due process by creating a mandatory rebuttable presumption of criminal intent that shifts the burden of persuasion to the defendant to prove his innocence. See U.S. Const. amends. V, XIV; Utah Const. art. I, §7; §76-1-501, Utah Code Ann (1990); Francis v. Franklin, 86 L.Ed.2d 344 (1985); State v. Turner, 736 P.2d 1043 (Utah App. 1987).

FACTS

Plaintiff State alleges that on April 18, 1992, the defendant took an operable motor vehicle belonging to his friend, Jeb Clark, then told Clark that he would return the car only when Clark paid him $20 for his work replacing the car's brakeshoes. Clark located the car several hours later in the possession of defendant. The defendant ran away, was caught and beaten by Mr. Clark's friend, and Mr. Clark repossessed the car.

ARGUMENT

On September 11, 1992, defendant was charged with Theft under §76-6-404, Utah Code Ann. (1990):

> 76-6-404. Theft - Elements
>
> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Theft of an operable motor vehicle is classified as a second-degree felony under §76-6-412(1)(a)(ii), Utah Code Ann. (1990):

> 76-6-412. Theft - Classification of offenses - Action for treble damages against receiver of stolen property.
>
> (1) Theft of property and services as provided in this chapter shall be punishable:
>
> (a) as a felony of the second degree if the:
>
> . . . .
>
> (ii) property stolen is a firearm or an operable motor vehicle;
>
> . . . .

Section 76-6-404 requires that the actor have a "purpose to deprive" the owner of the motor vehicle. "Purpose to deprive" is defined as follows under §76-6-401(3), Utah Code Ann. (1990):

> 76-6-401. Definitions.
>
> For the purposes of this part:
>
> . . . .
>
> (3) "Purpose to deprive" means to have the conscious object:
>
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
>
> (b) To restore the property only upon payment of a reward or other compensation; or
>
> (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.
>
> . . . .

This Court should not instruct the jury on the provisions of §76-6-401(3)(b) because the statutory language would create a mandatory rebuttable presumption on the facts of this case that the defendant possessed the requisite mens rea for the offense of Theft as charged. A mandatory rebuttable presumption of guilt violates constitutional due process in the criminal context because it shifts

the burden to the defendant to prove his innocence. U.S. Const. amends. V, XIV; Utah Const. art. I, §7.[1]

This may be an issue of first impression, but Utah courts have applied the same reasoning to prohibit instructing juries on other statutes. In State v. Turner, 736 P.2d 1043 (Utah App. 1987) the Court of Appeals reversed defendant's conviction for Burglary and Theft because the trial court instructed the jury verbatim according to the provisions of §76-6-402(1), Utah Code Ann. (1978):

> 76-6-402. Presumptions and defenses.
>
> The following presumption shall be applicable to this part:
>
> > (1) Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.
>
> . . . .

---

[1] Section 76-1-501, Utah Code Ann. (1990), codifies these constitutional principles:

> 76-1-501. Presumption of innocence - "Element of the offense" defined.
>
> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.
> (2) As used in this part the words "element of the offense" mean:
>
> > (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;
> > (b) The culpable mental state required.
>
> (3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

The court wrote:

> In this case the trial court instructed the jury that possession of recently stolen property, in the absence of a satisfactory explanation, is "prima facia" evidence of theft by the person in possession of the property. Such an instruction, nevertheless, fits within the Franklin definition of a mandatory rebuttable presumption: "A [mandatory] rebuttable presumption ... requires the jury to find the element unless the defendant persuades the jury that such a finding in unwarranted.
>
> . . . .
>
> We hold that Chambers and Pacheco are dispositive of whether Instructions 17, 18, and 19 herein are constitutional. Those instructions violate due process because they relate to the issue of guilt and relieve the State of its burden of proof. We reiterate the admonition in Chambers that the language of Utah Code Ann. §76-6-402(1) (1978), parroted in Instructions 17 and 18, should not be used in any form to instruct juries in theft and burglary cases. State v. Chambers, 709 P.2d at 327.

Id. at 1045 (quoting State v. Chambers, 709 P.2d 321, 326 (Utah 1985), quoting Francis v. Franklin, 85 L.Ed.2d 344 (1985)); but see State v. Johnson, 745 P.2d 452, 456 (Utah 1987) (alteration of statutory language may cure constitutional defect).

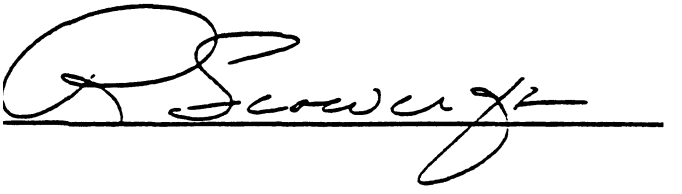
CONCLUSION

For these reasons this Court should not instruct the jury according to the provisions of §76-6-401(3)(b) because such an instruction shifts the burden of proof to the defendant to prove his innocence contrary to constitutional due process of law.

DATED this 4 day of February, 1993

ROGER K. SCOWCROFT
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 4 day of February, 1993.



ADDENDUM C

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ADDENDUM D

Roger K. Scowcroft
Attorney at Law
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

QUESTIONNAIRE

1. Do you believe that Jeb Clark owned the Datsun automobile that Mr. Boren worked on and later took?

Yes x

No _____

No Opinion ____

Explain:

Jeb Clark had possession of the automobile. Whether his possession was entirely legal seemed irrelevant to the trial. Mr. Clark was not on trial, Mr. Boren was. And it seemed clear that the defendant took possession of something that wasn't his.

2. Do you believe that the defendant, Mr. Boren, intended to permanently deprive Jeb Clark of his automobile?

Yes _____

No x

No Opinion ____

Explain:

I believe Mr. Boren took the property with intent to get payment for fixing the brakes.

3. Do you believe that the defendant, Mr. Boren, intended to temporarily deprive Jeb Clark of his automobile?

Yes _x_

No _____

No Opinion ____

Explain:

Same as response to #2

4. During your jury deliberations on February 10, 1993, the jury requested that the Court make available portions of the record. Why?

Explain:

One jury member seemed confused about what had been stated in court as opposed to what other members were saying.
As I recall, the dispute centered around the license plate issue.

5. A copy of the jury instructions is attached to the back of this Questionnaire.. During your jury deliberations on February 10, 1993, the jury requested that the Court explain Instruction No. 10. Did Instruction No. 10 confuse you or other members of the jury? Why?

Yes __x__

No _____

No Opinion ____

Explain:

One jury member was confused. All agreed that the defendant had "obtained" unauthorized control of the property. All agreed that the defendant took the property for "payment", and all agreed that it was an "operable motor vehicle."
One member felt that the "or's" in "purpose to deprive" should be read as "and's", meaning that all conditions in that paragraph should be met.

6. Having heard the testimony at trial, do you believe that the defendant, Mr. Boren, had ever been convicted of other crimes? Did your belief in that regard influence your decision to convict Mr. Boren for Auto Theft as charged at trial?

Yes _____

No __x__

No Opinion ____

Explain:

Yes, there was testimony about Mr. Boren's previous record. It received little or no attention from the jury, however, and the testimony did not influence my decision.

7. **Other comments or observations:**

While all felt the defendant was guilty, some wanted a lesser charge. I felt that the state was making a big deal out of a fairly insignificant matter.
However, I and others felt that because of the instructions, a lesser charge could not be considered unless the accused was "not guilty of the greater offense." (Instructions #12 & #13)

DATED this 26th day of February, 1993.

GARTH N. PETERSON